

ROGERS JOSEPH O'DONNELL

April 24, 2015

Via Email, Facsimile and U.S. Mail

John C. McMillan
Office Engineer
Department of Transportation
1727 30th Street
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Sacramento, CA 95816
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(916) 227-6282

Re: Response to Clean Cut's Protest of WABO's Bid
Caltrans Project ID 0613000001; Contract No. 06-0Q2104

Dear Mr. McMillan,

This office represents WABO Landscape Construction, Inc., the low bidder on the above-referenced contract. I write in response to Clean Cut Landscape's April 13, 2015 protest of WABO's bid.

In the protest, Clean Cut argues that WABO's bid is non-responsive because it included two quotes from its DVBE supplier in the Certified DVBE Summary that was submitted four days after the bid was submitted. Clean Cut argues that the inclusion of the two quotes from a DVBE vendor, Sam's Equipment & Supplies, constitutes a "material variation" because it somehow provides WABO with a competitive advantage. Clean Cut also alludes the quotes somehow demonstrate improper bid shopping. These arguments are meritless.

A. WABO's Bid Was Fully Responsive.

WABO fully complied with all bid instructions. Clean Cut has not identified any item in WABO's actual Bid Book, submitted on March 19, 2015, that is non-responsive to the instructions. Instead, Clean Cut points to superfluous paperwork that was submitted with the Certified DVBE Summary several days later.

However, WABO also complied with all the instruction for the DVBE Summary (the "Summary"). Caltrans' Notice to Bidders and Special Provisions ("Notice")

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directs the bidder to use Caltrans' form for the Summary. See Notice, §§ 2-1.15B and 2-1.33. The instructions are included in the Summary form itself. See Form DES-OE-0102.5. The Summary requires the bidder to list the "Total Claimed Participation" for DVBEs as a total dollar amount and percentage of the total bid. WABO complied, indicating total DVBE participation of \$136,077.28, at 3.45% of its total bid. The Summary instructs bidders to list the name of all first-tier DVBEs and their items of work, as well as the dollar amount for that work. WABO fully complied with this as well. For Sam's Equipment, WABO listed the supply of 1,957 tons of rock for the "Rock Blanket" in Bid Item 12, at a dollar amount of \$104,733.28.

WABO also provided the quote documents from its DVBEs with its Summary, along with proof of their DVBE certification. For Sam's Equipment, WABO disclosed both its initial quote from March 19, 2015, and its updated quote from March 23, 2015 (the same date as the Summary). Significantly, there is no indication in WABO's Summary that the DVBE participation is based on the initial quote. It is patently clear that the dollar amount and quantities in the initial quote are not included in the DVBE participation listed for Sam's Equipment. Meanwhile, the dollar amount and quantities in Sam's updated quote exactly match the numbers listed for Sam's DVBE participation: 1,957 tons of rock for a total of \$104,733.28.

The inclusion of Sam's initial quote does not make WABO's Summary non-responsive. The instructions do not prohibit the inclusion of more than one quote from the same DVBE. Regardless of the inclusion of this superfluous quote, all of the information in the Summary is consistent. Sam's updated quote precisely matches the required information that was listed for Sam's. And all of the listed amounts for each DVBE add up to the Total Claimed Participation of \$136,077.28. Thus, there is no variance in the material information required in the Summary.

B. The Superfluous Quote from Sam's Equipment Is Not a Material Variation.

Even assuming that providing documentation of an irrelevant quote somehow contradicted the bid instructions, it is at most an immaterial variation. If true, this would still not require a rejection of WABO's bid.

A public agency may use its discretion to waive an immaterial variation, which is any irregularity that does not afford the bidder "an unfair competitive advantage by allowing it to make a lower bid than it would have been able to make without the deviations." *Ghilotti Const. Co. v. City of Richmond*, 45 Cal. App. 4th 897, 906 (1996).

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"The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders." *Ibid.*

Here, there is no feasible argument that including the Sam's superfluous initial quote allowed WABO to "make a lower bid." WABO's total bid of \$3,939,896 was submitted four days before the Summary, and WABO had no ability to lower it. The bid was already locked-in, so there was no possibility of creating a competitive advantage.

C. WABO Did Not Engage in Improper Bid Shopping or Otherwise Disadvantage its DVBE.

This argument in Clean Cut's protest is a red-herring, as whether or not WABO negotiated a lower price with Sam's Equipment is not an issue of responsiveness. Nevertheless, WABO did not engage in any improper conduct.

This was not an instance of improper bid shopping. The difference in price between the quotes was simply the result of further discussions between WABO and Sam's Equipment about the needs of the project, and also the result of having more time for Sam's to source the material. Sam's initial quote was based on a very general description of the work. Thus, the initial quote generically describes the requested material as "Cobble/Rocks." Upon further discussion with WABO over the four days subsequent to the bid, WABO and Sam's confirmed that 4x8 Noiyo Cobble was appropriate, and that only 1,957 tons was needed instead of 2,700 tons. This is standard procedure for a material supplier. Moreover, Sam's has informed WABO that the updated quote did not result in a lower profit-margin for Sam's, and that it will be providing Caltrans with a letter in support of WABO's opposition to the protest.

Finally, this conduct was not prohibited by law or the bid instructions. WABO could change the amount of cobble that Sam's Equipment supplied because it did not list Sam's Equipment in its bid. The Subletting and Subcontracting Fair Practices Act, Public Contract Code section 4100, et seq. (the "Act"), only requires the listing of subcontractors. There is no requirement in the Act, or in the bid instructions for this project, to list material suppliers such as Sam's Equipment. Clean Cut clearly understood this, as it did not include North Valley Barricades in the list of subcontractors in its bid. Clean Cut's DVBE summary states that North Valley would supply \$94,822.61 of traffic control equipment. This is well in excess of ½ of 1% of Clean Cut's total bid, which would require Clean Cut to list North Valley if it was a subcontractor. See Public Contract Code §4104(a)(1).

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Notably, bidders are expressly prohibited from changing DVBE subcontractors and suppliers once they are listed in the Summary, unless Caltrans authorizes a substitution. See Notice, p. 16 of 339, §5-1.13C. Additionally, bidders are required to maintain the DVBE participation rate listed in their Summary. See Caltrans' Construction Manual, §8-303A. Thus, bidders are effectively prohibited from changing their DVBE's scope of work only after they are listed in the Summary. This indicates that a change in scope, such as reducing the cobble that Sam's Equipment provided from 2,700 tons to 1,957 tons, is acceptable if it is prior to submission of the Summary.

D. Conclusion

Clean Cut's protest is entirely meritless. WABO's inclusion of Sam's superfluous quote with its Summary is not non-responsive. There is no prohibition against providing irrelevant quotes, and it did not in any way affect the required information that was provided. Furthermore, even if providing the initial quote was somehow non-responsive, it was not a material variation because it did not allow WABO to lower its bid. Finally, it was not improper bid shopping. Caltrans' own rules indicate that it is acceptable to change the scope of material from a DVBE supplier at any time prior to submission of the Summary.

Accordingly, WABO respectfully requests that Caltrans deny this protest, and award the contract to WABO as the lowest bidder.

Best regards,



Tyson Arbuthnot

TA:jy

cc: WABO Landscape & Construction, Inc.

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Facsimile Transmittal Sheet

April 24, 2015

To:	John C. McMillan Office Engineer Department of Transportation	Phone: Fax: (916) 227-6282
From:	Tyson Arbuthnot	
Re:	Response to Clean Cut's Protest of WABO's Bid Caltrans Project ID 0613000001; Contract No. 06-0Q2104	
Message:	Please see attached correspondence.	

Please call Joya Yeung at 415.956.2828 if you did not receive a total of 5 pages.

Original **WILL** follow.

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